IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 62759-7-I
v.	)	DIVISION ONE
MARK W. RATHBUN, Appellant.	)	UNPUBLISHED OPINION
	)	FILED: May 10, 2010

Spearman, J.--In 2008, a jury found Mark W. Rathbun guilty of three counts of burglary in the first degree and three counts of rape in the first degree. The judgment and sentence requires Rathbun to pay a $100 DNA collection fee. Rathbun asserts that because he committed the crimes in 1996 and the statute requiring offenders to pay the DNA collection fee was not enacted until 2002, the trial court erred in ordering him to pay the fee. But the language of RCW 43.43.7541 unambiguously states that it applies to "every sentence" and we have held that sentencing is the triggering event for application of the mandatory DNA fee. Because Rathbun was sentenced in 2008, after the amendment to RCW 43.43.7541 made the DNA collection fee mandatory, we conclude the trial court did not err when it imposed the DNA collection fee as part of Rathbun's

sentence, and affirm.

FACTS

In 2008, the State charged Mark W. Rathbun with three counts of burglary in the first degree and three counts of rape in the first degree, committed in 1996. After an eight-day trial, the jury found Rathbun guilty as charged.

The court found that Rathbun's criminal history included 58 felonies and that, because Rathbun had committed multiple current offenses, his offender score would result in some of the offenses going unpunished. Accordingly, the court imposed an exceptional sentence. In the judgment and sentence, the court also ordered Rathbun to pay a $100 DNA collection fee.

Rathbun appeals the portion of the judgment and sentence requiring him to pay the $100 DNA collection fee.

DISCUSSION

Rathbun asserts that because he committed the crimes in 1996 and the statute requiring offenders to pay the DNA collection fee was not enacted until 2002, there was no statutory authority for a DNA collection fee, and thus the court erred in imposing the fee.

In 2002, the legislature enacted RCW 43.43.7541, which required courts to impose a $100 DNA collection fee with every sentence imposed under chapter 9.94A RCW for certain specified crimes, "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541 (2002); State v. Thompson, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009). The

statute only applied to felonies "committed on or after July 1, 2002." Former RCW 43.43.7541 (2002). In 2008, however, the legislature passed an amendment to make the fee mandatory regardless of hardship. RCW 43.43.7541 ("Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars."). This amendment also removed any reference to the date when the felony was committed. RCW 43.43.7541. The amendment took effect June 12, 2008. Laws of 2008, ch. 97, § 3; Thompson, 153 Wn. App. at 336.

This court addressed similar facts and arguments in two recent cases: Thompson, 153 Wn. App. 325, and State v. Brewster, 152 Wn. App. 856, 218 P.3d 249 (2009). In each of those cases, the defendants committed their offenses after RCW 43.43.7541 was enacted in 2002, but before the 2008 amendment went into effect.

In Brewster, the defendant argued that the saving statute, RCW 10.01.040, barred the application of RCW 43.43.7541. Brewster, 152 Wn. App. at 859. Under the saving statute, criminal cases generally must be prosecuted and decided according to the law in effect at the time of the offense. Brewster, 152 Wn. App. at 859. But we held that Brewster was subject to the version of the statute in effect at the time of her sentencing because the DNA collection fee is not punitive and the saving statute applies only to criminal and penal statutes. Brewster, 152 Wn. App. at 859, 861.

In Thompson, we held that the state and federal constitutional provisions

against ex post facto laws are not a basis for avoiding the application of the 2008 statutory amendment. Thompson, 153 Wn. App. at 337. Our reasoning was that the ex post facto clauses of the federal and state constitutions only apply to punitive laws and the DNA fee is not punitive. Thompson, 153 Wn. App. at 337.

Rathbun contends that Brewster and Thompson are distinguishable because, in those cases, the defendants committed the offenses after the legislature enacted RCW 43.43.7541 in 2002. Rathbun asserts that because he committed the offenses in 1996, before RCW 43.43.7541 was enacted, there was no statutory authority for a DNA collection fee, and consequently the court erred in imposing the fee.

In support of this contention, Rathbun argues that application of the DNA collection fee violates RCW 9.94A.345, which provides, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." Rathbun also relies on State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007), and State v. Humphrey, 139 Wn.2d 53, 983 P.2d 1118 (1999), to argue that RCW 43.43.7541 cannot be applied to offenses that occurred before its 2002 effective date because it imposed a new obligation.

We addressed similar arguments in Thompson and determined that the defendant's reliance on Pillatos and Humphrey was misplaced. In Humphrey, the court began with the general presumption that statutes apply prospectively

unless there is some legislative indication to the contrary. Humphrey, 139 Wn.2d at 57. Finding no clear legislative identification of a triggering event for application of the statute, the court relied upon the general presumption and concluded that the amendment could not be applied to offenses committed before its enactment. However, in Thompson we held that, unlike the statute in Humphrey, RCW 43.43.7541 is clear and unambiguous that sentencing is the triggering event invoking the application of the mandatory DNA fee. Thompson, 153 Wn. App. at 338. Thus, Humphrey is not applicable in the circumstances presented here.

In Pillatos, the defendants also relied on RCW 9.94A.345 to support their argument that, because the effective date of new procedures for imposing an exceptional sentence occurred after the commission of their offenses, the new procedures could not be applied to them. But the court found that because the law in effect both before and after the offenses were committed permitted the imposition of exceptional sentences, the change in procedures did not violate the letter or the purpose of RCW 9.94A.345. Pillatos, 159 Wn.2d at 473.

Rathbun argues it would violate the reasoning of Pillatos to impose the DNA fee on him now because RCW 43.43.7541 was not in effect when he committed his crimes. But this argument ignores the underlying premise of Pillatos, which is that RCW 9.94A.345 was applicable in that case because it involved the issue of punishment. In Pillatos, the court explicitly held that the legislature's express intent in enacting RCW 9.94A.345 was to "make clear that

defendants had no vested rights in prior, more lenient, offender score calculation statutes." Pillatos, 159 Wn.2d at 472-473. In the instant case, consistent with our previous determinations in Brewster and Thompson, we hold that the DNA fee is not punitive. Thus, Pillatos does not control in this matter.

Here, Rathbun was sentenced on December 5, 2008, after the amendment to RCW 43.43.7541 took effect. We conclude that the trial court did not err in ordering Rathbun to pay the $100 DNA collection fee as required by RCW 43.43.7541.

We affirm.

Spearman, J.

WE CONCUR:

Cox, J.

Grosse, J